Supreme Court, U.S.
FILED

No. 05-1546

FEB 14 2006
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IN THE

Supreme Court of the United States

LINDA STETLER, DENNY STETLER, AND L.D.R., INC.,
Petitioners,

versus

FIRST SOUTHERN NATIONAL BANK, WARD CORRELL, LAKE CUMBERLAND SHELL AND CLINTON COUNTY, KENTUCKY,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

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PETITION FOR A WRIT OF CERTIORARI

EDNA JENELLE COULTER
219 McGowan Avenue
Bardstown, Kentucky 40004
502-249-1744
Counsel for Petitioners

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the trial court's Order denying the Movant's CR 60.02 Motion was properly appealable.

2. Whether the trial court's Order denying the Movants' CR 12.08(3) Motion was properly appealable.

3. Whether the cases of law cited by the Respondents as authority are distinguishable from the case at bar.

4. Whether the actions of the trial court infringed the Petitioner's right to the Due Process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005
No._____

Linda Stetler, Denny Stetler, and
L.D.R., Inc., Petitioners
v.
First Southern National Bank, Ward Correll, Lake Cumberland Shell and Clinton County, Kentucky, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linda Stetler, Denny Stetler, and L.D.R., Inc., the Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in the above-entitled case on November 16, 2005

OPINION BELOW

The judgment of the Supreme Court of Kentucky (Appendix D) was entered on November 16, 2005.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257.

PARTIES

Linda Stetler, Denny Stetler, and L.D.R., Inc. Petitioners.

First Southern National Bank, Ward Correll, Lake Cumberland Shell, and Clinton County, Kentucky Respondents.

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STATEMENT OF THE CASE

This action arises out of a Complaint filed in Clinton Circuit Court by the Respondents herein, seeking to enforce a mortgage. Judgment was entered against the Petitioners herein, despite the fact that the Petitioners had filed bankruptcy pursuant to chapter 11 of the Bankruptcy Act, and an automatic stay was in effect at the time of the purported Judgment.[1] The Circuit Court, nevertheless, over the objections of the Petitioners, ordered the property sold pursuant to the purported Judgment, and Norbert Sohm, Esq., the Master Commissioner of that Court, conducted a sale of the property by public outcry on the steps of the Clinton County Courthouse on June 26, 2004.

The property was sold to Respondent Ward Correll, and the sale confirmed to him on the same date, June 26, 2004. Mr. Correll thereafter transferred his interest in the property to Cumberland Oil Company, of which he was and is the major

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[1] This matter is currently on appeal to the United States Court of Appeals for the Sixth Circuit.

stockholder, and the property was purportedly conveyed to Cumberland Oil Company by a master commissioner's deed.

On July 6, 2004, the Petitioners filed a timely Motion to Alter, Amend or Vacate, pursuant to CR 59.05. That Motion was denied by Order of Clinton Circuit Court dated July 12, 2004. The Petitioners then, on July 23, 2004, filed a Motion to Set Aside the purported Judgment and sale, pursuant to CR 60.02.The Circuit Court denied that Motion by Order dated August 2, 2004. The Petitioners then, on September 1, 2004, filed a timely Appeal to the Kentucky Court of Appeals from the Clinton Circuit Court's Judgment denying their Motion to Set Aside the Judgment.

The Respondents thereafter, on September 28, 2004, moved that Court to Dismiss the Appeal. That court granted the Respondents' Motion and dismissed the appeal by Order dated December 22, 2004. The Petitioners then moved the Kentucky Supreme Court for Discretionary Review. That court denied the Petitioners' Motion by Order dated November 16, 2005. From that Judgment, Petitioners here appeal.

REASONS FOR GRANTING THE WRIT

1. The Order denying Petitioners' CR 60.02 Motion was properly appealable.

In their three paragraph "Argument," to the Kentucky Court of Appeals, the Respondents correctly noted that the Motion which is the subject of this Appeal was the second post-judgment Motion which the Petitioners had filed. (Respondents' Memo. at 2) The Respondents also noted, correctly, that while the Petitioners' first post-judgment Motion was interposed pursuant to CR 59.05, the second such Motion was interposed pursuant to CR 60.02.

The Respondents then stated, in a footnote: "**The fact that Appellants brought this post-judgment motion under CR 60 is of no consequence.**" Petitioners respond that such,

clearly, is not the law; *cf.*, CR 11 (a party's argument must be "warranted by existing law.") The fact that the Motion appealed from was interposed pursuant to CR 60.02, rather than CR 59.05, is of great significance; it is, in fact, dispositive of whether the Petitioners are entitled to bring this Appeal.

Four years after the adoption of the Kentucky Rules of Civil Procedure, the former Kentucky Court of Appeals, in *White v. Hardin County Board of Education*, Ky., 307 S.W.2d 754 (1957) clarified the rule for appellate practice under CR 59 and CR 60.02.

> It is our view that an order either sustaining or denying a motion for a new trial authorized by CR 59.01 and 59.02 is not a final order and is not appealable as such, though it may be reviewed on appeal from the final judgment. **An order denying a motion for a new trial under CR 60.02 is appealable because the motion under that rule in effect initiates a new proceeding.**

White v. Hardin County Board of Education, 307 S.W.2d at 756 (emphasis added).

The court subsequently reaffirmed this holding in *Hardin v. Waddell*, Ky., 316 S.W.2d 367, 368 (1958); and *Hackney v. Hackney*, Ky., 327 S.W.2d 570, 571-72 (1959). That such is the law in Kentucky courts, is also stated in the following treatises: WATSON CLAY, KENTUCKY PRACTICE: RULES OF CIVIL PROCEDURE ANNOTATED, CR 59.01 comment 5; CR 60.02 comment 14 (1963); WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE: CIVIL PROCEDURE § 60.02-11 (1985); and KURT A. PHILIPPS, JR., KENTUCKY PRACTICE: RULES OF CIVIL PROCEDURE ANNOTATED, CR 60.02 comment 11 (5th ed. 1995).

In *Hardin v. Waddell*, Kentucky's highest court specifically noted that Kentucky courts follow the practice of the federal courts under the parallel federal rules, Rule 59(e), F.R.C.P. and Rule 60(b), F.R.C.P. 316 S.W.2d at 368. The practice under the federal rules is stated as follows by the leading treatise Federal Practice and Procedure:

> An order denying a motion under Rule 60(b) is final and appealable, and an appeal from the denial of a Rule 60(b) motion must be filed separately from the appeal from the final judgment.

CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2871 at nn. 6 - 7 (2d ed. 1995).

As authority for this assertion, the treatise authors cite, among other cases, *Good v. Ohio Edison Co.*, 149 F.3d 413 (6th Cir. 1998), in which that court wrote:

> With respect to the district court's denial of Ohio Edison's Rule 60(b) motion to relieve it from a final judgment, **such a ruling is directly appealable.**

Good v. Ohio Edison Co., 149 F.3d at 417 (emphasis added).

As authority, the Sixth Circuit cited its prior holdings *Amernational Indus. Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991) and *Peake v. First National Bank and Trust Co. of Marquette*, 717 F.2d 1016, 1020 (6th Cir. 1983).

It is clear, therefore, that Respondents' assertion in the trial court that: "The fact that Appellants brought this post-judgment motion under CR 60 is of no consequence," misstated the law, and misled that Court.

2. The Order denying Petitioners' CR 12.08(3) Motion was properly appealable.

Respondents evidently failed to note that Petitioners also interposed their Motion pursuant to the provisions of CR 12.08(3). That subsection provides:

> Whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The right of a litigant to collaterally attack a judgment on the grounds that the court rendering it lacked jurisdiction of the subject matter, is well recognized. A. C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 322 (rev. 5th ed. 1925)("the cases leave no doubt respecting the right of a litigant to collaterally impeach a judgment that he can prove to be

void.") It is equally clear that such a collateral attack may be interposed at any time, even after judgment. PHILIPPS, *supra*, CR 12.08 comment 4 ("This jurisdictional defense may be raised at any time by any party in any court where the action is then pending.")

It is likewise obvious that, when such a collateral attack on the court's jurisdiction is made by means of a post-judgment motion, the denial of such motion is appealable. *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53, 56 (2d Cir. 1976); PHILIPPS, *supra*, CR 60.02 comment 11. The Petitioners, therefore, submit that the denial of their CR 12.08 Motion provided a second, independent grounds for appeal of the trial court's Order.

3. Respondents' authority is distinguishable.

In their brief "Argument" to the Kentucky Court of Appeals, the Respondents cited four cases as authority. Each of the cases cited is readily distinguishable from the case at bar, and actually furnishes the Respondents no support whatever.

(i) *Cloverleaf Dairy v. Michels*, Ky. App., 636 S.W.2d 894 (1982) involved the filing of two successive CR 59.05 Motions. The court stated that a litigant was not permitted to file a second CR 59.05 motion, and added that the proper course would have been for the litigant to have filed a CR 60.02 motion in place of the second CR 59.05 motion. This is, of course, exactly the procedure followed by the instant Petitioners. This case, therefore, actually supports the position of the Petitioners.

(ii) *Johnson v. Smith*, Ky., 885 S.W.2d 944 (1994) concerns whether the filing of a CR 50.05 motion by some parties suspends the appeal for those parties who did not join the motion. 885 S.W.2d at 948-49. This Court held that it does not. The case makes no mention of CR 60.02, and has no relevance whatever to the case at bar.

(iii) *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, Ky., 37 S.W.3d 713 (2000) concerns whether the timely filing of a notice of appeal without the requisite filing fee, is effective. This Court held that it was not. This case makes no mention whatever of either CR 59.05 or CR 60.02,

and appears to have no relevance whatever to the case at bar.

(iv) *Stewart v. Kentucky Lottery Corporation*, Ky. App., 986 S.W.2d 918 (1998), involved both motions. Summary judgment was entered against the plaintiff, who then filed a timely CR 59.05 motion, but did not file an appeal therefrom. 986 S.W.2d at 919. Almost three months later, the plaintiff filed a CR 60.02 motion, asking the trial court to allow him to file a notice of appeal *munc pro tunc*. *Id.*

The trial court denied the motion, and the plaintiff appealed to the Kentucky Court of Appeals. That court entertained the appeal, considered the merits of the case, and upheld the judgment of the trial court. 986 S.W.2d at 920. *Stewart* arose upon facts closely analogous to those of the instant action. The plaintiff in *Stewart*, like the instant Petitioners, filed a motion pursuant to CR 59.05, which was denied.

He then did not file an appeal from that order; the instant Petitioners, similarly, did not file an appeal from the Clinton Circuit Court's denial of their CR 59.05 motion. Stewart then, after the expiration of the appeal time, filed a CR 60.02 motion, which was denied. The instant Petitioners, likewise, filed a CR 60.02 motion after the appeal time had expired, and that motion was denied.

The *Stewart* plaintiff then appealed the denial of his CR 60.02 motion to the Kentucky Court of Appeals. That court entertained that appeal, considered the merits of the appeal, and ultimately sustained the judgment of the trial court. If that court had followed the procedure urged by the Respondents herein, it would have dismissed Stewart's appeal on the grounds that his CR 60.02 motion, a second post-judgment motion, was not appealable.

The court did not do so. Rather, it entertained the appeal, and addressed the merits of Stewart's claim in a reported opinion. It should have pursued a similar course in the instant case. Petitioners agree that *Stewart* is analogous to the case at bar, and highly relevant. They insist, however, that it affords the Respondents no support whatever, and actually supports the argument of the Petitioners.

CONCLUSION

As shown above, the judgment of the Kentucky Court of Appeals by which it dismissed the appeal of the Petitioners was contrary to law and must be reversed. The Court, therefore, should grant Certiorari to the Kentucky Supreme Court and, upon hearing, should remand the action with directions that the Petitioners' cause of action be reinstated. Petitioners pray for an Order of the Court so holding.

Respectfully submitted,

Edna Jenelle Coulter
219 McGowan Avenue
Bardstown, KY 40004
502-249-1744
Counsel for Petitioners

APPENDIX A

CR 59.05 Motion to alter, amend, or vacate a judgment

A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.

APPENDIX B

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

Amendment V

Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Supreme Court of Kentucky
2005-SC-0236-D
(2004-CA-1801)

LINDA STETLER,
DENNY STETLER, MOVANTS
L.D.R., INC. and
CLINTON COUNTY, KENTUCKY

V. CLINTON CIRCUIT COURT
NO. 1999-CI-0129

FIRST SOUTHERN NATIONAL BANK,
WARD CORRELL and
CUMBERLAND LAKE SHELL RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Roach, J., not sitting

ENTERED November 16, 2005.

Jos. E. Lambert

Chief Justice

APPENDIX E

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-001801-MR

L.D.R., INC., ET AL. APPELLANTS

APPEAL FROM CLINTON CIRCUIT COURT
v. ACTION NO. 99-CI-00129

FIRST SOUTHERN NATIONAL BANK, ET AL. APPELLEES

ORDER

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BEFORE: JOHNSON AND McANULTY, JUDGES; MILLER, SENIOR JUDGE[1]

The Court has considered appellants' motion to reconsider this Court's order of December 22, 2004, dismissing the appeal and appellees' response thereto. The Court, being sufficiently advised, ORDERS that the motion be DENIED.

ENTERED: FEB 23 2005

Robert W. Dyche, III
JUDGE, COURT OF APPEALS

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1 Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

APPENDIX F

CLINTON CIRCUIT COURT
40TH JUDICIAL CIRCUIT
CIVIL ACTION NO. 99-CI-00129

FIRST SOUTHERN NATIONAL BANK, WARD CORRELL AND CUMBERLAND LAKE SHELL — PLAINTIFF

v. **ORDER**

L.D.R., INC, LINDA STETLER, DENNY STETLER and CLINTON COUNTY, KENTUCKY — DEFENDANT

Defendants having filed Motions to alter, amend or vacate and to set aside the Judgment and suggestion of lack of jurisdiction, the Plaintiff having responded to same, and this matter having come before the Court for argument, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that said Motions shall be, and are hereby, OVERRULED.

Dated August 2, 2004

EDDIE C LOVELACE,
JUDGE

APPENDIX G

CLINTON CIRCUIT COURT
40TH JUDICIAL CIRCUIT
CIVIL ACTION NO. 99-CI-00129

FIRST SOUTHERN NATIONAL BANK, WARD CORRELL AND CUMBERLAND LAKE SHELL — PLAINTIFF

v. **ORDER**

L.D.R., INC, LINDA STETLER, DENNY STETLER and CLINTON COUNTY, KENTUCKY — DEFENDANT

This matter having come before the Court on Motion to Approve the Sale and direct the Master Commissioner to deliver the deed, and the Court having considered the objections to the confirmation of sale filed by Defendants LDR, Inc., Linda Stetler and Denny Stetler, having heard arguments of the parties and being familiar with the record and otherwise sufficiently advised, IT IS HEREBY found by the Court that

1. The monies tendered by objecting Defendants and paid into court are insufficient in amount to even satisfy the principal and interest which sums are readily calculated from the Summary Judgment and Order of Sale entered herein. It is additionally noted that the Judgment also allows for recovery of attorney fees, court costs, late charges and items such as insurance, supplied by the mortgage holder, all of which would serve to increase the amount due under the note, mortgage and judgment.

2. The Court further finds that the belated attempt to now object to the award of attorney fees contained within the Judgment and Order of Sale in not timely. Nonetheless, a review of the Note and Mortgage herein and of Kentucky case law, as cited in the Response to Objection to Confirmation of Sale clearly demonstrate that attorney fees are recoverable.

The Court further finds that master Commissioner Norbert Sohm, did not commit any fraud on the sale of the property in question.

IT IS THEREFORE ORDERED AND ADJUDGED that the sale of the subject real estate herein is hereby confirmed and the Master Commissioner shall deliver a deed to the successful bidder.

APPENDIX H

CLINTON CIRCUIT COURT
40TH JUDICIAL CIRCUIT
CIVIL ACTION NO. 99-CI-00129

FIRST SOUTHERN NATIONAL BANK, WARD CORRELL AND CUMBERLAND LAKE SHELL — PLAINTIFF

v. **ORDER**

L.D.R., INC, LINDA STETLER, DENNY STETLER and CLINTON COUNTY, KENTUCKY — DEFENDANT

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This matter having come on for hearing on the Motion of Plaintiff, Ward Correll,[1] for a Summary Judgment and Order of Sale. Hon. Theodore H. Amshoff, Jr., counsel for the defendants, L.D.R., Linda Stetler and Denny Stetler, informed this Court that within ten (10) days from October 7, 2002, he would file a written response to the motion for Summary Judgment and Order of Sale. However, counsel blatantly ignored his promises and failed to file any response. This Court having reviewed the record and being otherwise sufficiently advised, and it appearing that there is no genuine issue as to any material fact and that Correll is entitled to judgment as a matter of law, it is hereby ORDERED AND ADJUDGED as follows:

1. That Correll is hereby GRANTED a summary judgment against the Defendant, L.D.R., Inc.;[2] the Court finds that the allegations contained in Plaintiffs' original Complaint and Amended Complaint are true and that as of June 15, 2000, there is due and owing to Correll, as set forth in the original and amended Complaint:

[1] Under the terms of the Note, in the principal amount of $212,489.96, together with interest thereon at the rate of 8.00% per annum, until the date of judgment, which accrued interest as of August 1, 2002 in equal in amount to $81,118.13 and interest at the

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1 Hereinafter referred to as "Correll"

2. Hereinafter referred to as "L.D.R."

legal rate of 12.00% from the date of judgment until paid;

[ii] for the amount of late charges on the Note owing as of August 2, 2002 in the amount of $1,262.76 and late charges which may accrue until the date of Judgment and thereafter, plus interest as specified in [1] above;

[iii] for payments made by Corell out of its own funds for taxes, insurance and other charges as required to protect and preserve the Mortgaged Property together with the interest as of August 1, 2002 in the amount of $400.00 as specified in [1] above;

[iv] for Plaintiffs' costs herein expended, for all its reasonable attorneys' fees for which Plaintiff may liquidate by submission of the affidavits after the sale of the Mortgaged Property for which total amount judgment is hereby rendered in favor of Correll and against L.D.R.

2. That to secure payment of its Judgment, Correll is hereby adjudicated to have a first mortgage lien on the following described property, located in Clinton County, Kentucky, which is more particularly described in **Exhibit A** attached hereto and incorporated herein by reference (the "Mortgaged Property") which lien is first, prior and superior to any and all other liens and encumbrances thereon, except for any liens securing the payment of unpaid and delinquent ad valorem taxes on the Mortgaged Property.

3. That the Mortgaged Property cannot be divided without materially impairing its value and it shall be sold by the Master Commissioner of the Clinton Circuit Court (the "Master Commissioner"), free and clear of the interest and claims of the parties hereto and all liens and encumbrances thereon, subject only to [i] the lien for current ad valorem taxes and [ii] any easements or restrictions recorded prior to the recordation of Correll's Mortgage.

4. That the Master Commissioner is ordered and directed to offer the Mortgaged Property at public sale, by the Master Commissioner on a date to be set by the Master Commissioner in the City of Albany, Clinton County, Kentucky upon the following terms and conditions:

a. The purchaser shall be required to make a cash deposit of ten percent (10%) of the sale price at the time of sale;

b. The purchaser shall be required to assume and pay all ad valorem taxes and assessments for the current tax year and all subsequent years;

c. The purchaser shall be required to execute a bond or bonds with sufficient sureties thereon which shall have the force and effect of a judgment in order to secure the payment of the balance of the purchase price, with interest thereon at the rate of twelve percent (12%) per annum until paid, and said bond shall constitute a lien on said property until paid;

d. Any purchaser or purchasers shall have the privilege of paying all or any part of the purchase price or paying said bond or bonds before maturity by paying the balance of principal, together with all accrued interest thereon;

e. Upon default of said deposit by the purchaser, the Commissioner shall resell the property upon the same terms and conditions set out herein;

f. The Mortgaged Property shall be sold free and clear of the claims and interests of all parties herein and of all liens and encumbrances of record thereon except restrictions and easements appearing of record in the Clinton County Court Clerk's office prior to the recordation of the Spring Creek Enterprises, Inc's Mortgage, to which CORRELL in a successor-in-interest.

g. The Commissioner before making said sale, shall advertise the time, place and terms thereof by inserting a notice of the time, place and terms of said sale, together with a description of the property to be sold and the amount for which it is to be sold in a newspaper of general circulation in Clinton County, Kentucky, at least once a week for three successive weeks receding the date of sale;

h. The Commissioner, before making said sale, shall appoint two disinterested housekeepers, not related to any of the parties in this action, to appraise the Mortgaged Property. The appraisers shall be sworn by the Commissioner before making their appraisal in writing to the Commissioner, the same to be a part of the record in this action;

i. In the event that the successful bidder is CORRELL, it shall not be required to make any cash deposit of bond and the Commissioner shall credit the purchase price against the amount of CORRELL's judgment herein;

j. Possession shall be given to the purchaser upon payment of the full purchase price. Risk of loss on improvements shall pass to

the purchaser upon confirmation of the sale.

k. That the Defendant, Air Park or any tenant thereof, immediately vacate and surrender the Mortgaged Property herein described.

5. That Correll's mortgage lien herein adjudged shall attach to the proceeds of the sale of the Mortgaged Property and shall be first, prior and superior to any and all other liens and encumbrances thereon except for any liens securing the payment of unpaid and delinquent ad valorem taxes, if any.

6. That any proceeds of the sale remaining after the payment of the costs and expenses of the sale, the payment of delinquent ad valorem tax liens, the payment of Correll's first, prior and superior mortgage lien on the Mortgaged Property, shall be paid pursuant to further orders of the Court.

7. That the Court shall retain jurisdiction over this action regarding any additional matters which may come on for hearing, including, without limitation, confirmation of the sale, determination of the priorities of the parties, and distribution of proceeds.

8. That upon confirmation of the sale of the Mortgaged Property, the Defendants, L.D.R., Linda Stetler and Denny Stetler and/or any persons or entities in possession of the Mortgaged property shall be required to vacate the Mortgaged Property since they are no longer entitled to the possession thereof.

9. This Summary Judgment and Order of Sale, as to the issues disposed of herein, is final, there being no just reason for delay.

10. The Clerk of the Court is hereby ORDERED and DIRECTED to serve copies of this Summary Judgment and Order of Sale upon all parties to this action.

Given under my hand as Judge of the CLINTON Circuit Court this 22nd day of October, 2002

Eddie C. Lovelace
Judge, Clinton Circuit Court

Supreme Court, U.S.
FILED
No. 051546 FEB 14 2006
IN THE OFFICE OF THE CLERK

Supreme Court of the United States

LINDA STETLER, DENNY STETLER, AND L.D.R., INC.,
Petitioners,

versus

FIRST SOUTHERN NATIONAL BANK, WARD CORRELL, LAKE CUMBERLAND SHELL AND CLINTON COUNTY, KENTUCKY,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

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SUPPLEMENTAL APPENDIX

EDNA JENELLE COULTER
219 McGowan Avenue
Bardstown, Kentucky 40004
502-249-1744
Counsel for Petitioners

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2004-CA-001801-MR

L.D.R., INC., ET AL. APPELLANTS

v. APPEAL FROM CLINTON CIRCUIT COURT
ACTION NO. 99-CI-00129

FIRST SOUTHERN NATIONAL
BANK, ET AL. APPELLEES

ORDER DISMISSING APPEAL

****

BEFORE: JOHNSON AND MCANULTY, JUDGES;
MILLER, SENIOR JUDGE[1]

This matter is before the Court on appellees' motion to dismiss appeal to which appellants responded. Appellees contend that the appeal was not timely filed. The Court is in agreement and, therefore, it is ORDERED that appellees' motion to dismiss appeal be GRANTED.

The background of this matter is as follows. An order confirming sale was issued on June 26, 2004. Appellants filed a timely CR 59 motion, which was denied on July 12, 2004, with the notation pursuant to CR 77.04(2) being made on the same date. No notice of appeal was filed within thirty days thereafter. Appellants then filed a motion pursuant to CR 60.02, which was denied on August 2, 2004. The notice of appeal was filed on September 1, 2004.

Appellees argue that the time in which to file a notice of appeal began running on July 12, 2004, and expired on

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1. Senior Judge John D. Miller sitting as Special Judge by asignment of the Chirf Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580

August 12, 2004, and that the filing of the motion pursuant to CR 60.02 is of no consequence. In response, appellants strongly object to this assertion. They claim that their appeal is timely because the denial of a motion pursuant to CR 60.02 is final and appealable and they "filed a timely appeal to this Court from the Judgment denying their motion to set aside judgment."

The Court has reviewed the notice of appeal and notes that it designates the judgment of June 26, 2004, and the order denying the motion pursuant to CR 59.[2] The notice of appeal does not specifically designate the order denying the motion pursuant to CR 60.02. In addition, a review of the issues listed in the prehearing statement makes it clear that appellants' intent was to challenge the merits of the June 26, 2004, judgment, rather than raising the issue as to whether the trial court abused its discretion in denying their motion pursuant to CR 60.02. However, the time in which to appeal from the June 26, 2004, judgment expired thirty (30) days following July 12, 2004. The Court concludes that this appeal is untimely.

Based on the foregoing, it is ORDERED that Appeal No. 2004-CA-001801-MR be DISMISSED.

ENTERED: DEC. 27, 2004

William E. McAnulty, Jr.
Judge, Court of Appeals

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2. The notice of appeal erroneously states that said order was entered on August 2, 2004.